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**PUBLIC REDACTED
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16 UNITED STATES DISTRICT COURT
17 CENTRAL DISTRICT OF CALIFORNIA

18 ENTREPRENEUR MEDIA, INC., a
19 California Corporation,

Case No. 8:12-cv-02168-CJC-AN

20 Plaintiff,
21 v.
22 ARIADNE CAPITAL LIMITED, a
U.K. company and
23 ENTREPRENEUR COUNTRY, an
unknown entity,
24 Defendants.

**JOINT STIPULATION ON MOTION
OF DEFENDANT ARIADNE
CAPITAL LIMITED TO COMPEL
PLAINTIFF ENTREPRENEUR
MEDIA, INC. TO PRODUCE
DOCUMENTS RESPONSIVE TO
ARIADNE'S FIRST SET OF
DISCOVERY REQUESTS**

Hearing Date: July 17, 2014
Time: 10:00 a.m.
Place: Courtroom 6B
Judge: Magistrate Judge Nakazato
Discovery Cutoff: Aug. 1, 2014
Pre-trial Conf.: Nov. 3, 2014
Trial: Nov. 18, 2014

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1 **I. Ariadne's Introduction**

2 Defendant Ariadne Capital Limited ("Ariadne") is a London-based company
 3 with no U.S. operations, whose business is to connect digital start-up companies in
 4 the U.K., Europe and in other foreign countries with larger companies that might be
 5 interested in partnering with or investing in the start-ups. Ariadne runs a website
 6 called entrepreneurcountry.com, runs entrepreneurship forums in London, and
 7 sends out free informational e-mail digests to persons who previously signed up on
 8 the entrepreneurcountry.com website.

9 Plaintiff Entrepreneur Media, Inc. instituted this action against Ariadne in
 10 December 2012, asserting various causes of action related to Plaintiff's weak
 11 Entrepreneur trademark. *See Entrepreneur Media, Inc. v. Smith*, 279 F.2d 1135,
 12 1143 (9th Cir. 2002) (holding that "the need of others in the marketplace to use the
 13 term 'entrepreneur' to describe their goods or services confirms that [Plaintiff]'s
 14 mark is descriptive"). More than a year-and-a-half later, Plaintiff has failed to
 15 provide any meaningful production of documents in response to Ariadne's
 16 discovery requests—which were served on December 30, 2013 and go directly to
 17 any likelihood of confusion—and continues in its refusal to do so. **To date,**
 18 **Plaintiff's entire production has consisted of approximately 250 cherry-picked**
 19 **documents.** *See infra*, Section III.F.1. Plaintiff's failure to provide any
 20 meaningful discovery is especially troubling considering that it has frequently
 21 litigated the alleged infringement of its Entrepreneur mark in the past and should
 22 have the requested information at the ready, either in its offices or its attorneys'
 23 litigation files. Indeed, as the plaintiff, it should have been prepared to produce
 24 material relevant to its allegations at the outset of the case, but has not done so.
 25

26 Instead, since early April, Plaintiff has effectively strung Ariadne along
 27 through settlement discussions and reassurances that it would supplement its
 28 production in an apparent effort to run out the clock on the discovery deadline.

1 Ariadne first wrote to Plaintiff regarding its document production deficiencies on
 2 April 3, at which point Plaintiff had produced a paltry eight documents, despite
 3 having agreed to produce documents responsive to at least Ariadne's Document
 4 Request Nos. 1, 3, 5, 13, 15-19, 27, 31-32, 35-39, and in connection with
 5 Interrogatory Nos. 4 and 5. These Requests and Interrogatories broadly encompass
 6 business plans, market research, polls, studies, evidence of confusion, evidence of
 7 damages, invoices, sales information, trademark enforcement and licensing,
 8 marketing expenditures, customer information, marketing plans, and related
 9 communications. Plaintiff assured Ariadne on April 14 that it would make a
 10 substantial production by the end of that week, only to then produce a mere 16
 11 additional documents two days later, largely consisting of Internet screenshots
 12 taken the week before. Ariadne again contacted Plaintiff on April 21 to address the
 13 obvious inadequacies with its production. On April 28, Plaintiff produced another
 14 230 documents, barely addressing Ariadne's requests. Zambrzycki Decl. ¶¶3-8.

15 On May 6, 2014, Ariadne requested a meet-and-confer about the continuing
 16 deficiencies with the production Plaintiff agreed to, as well as the numerous
 17 categories of documents which Plaintiff has flatly refused to produce even though
 18 such documents go to the heart of its claims and Ariadne's defenses. *Id.* ¶9.¹ In
 19 terms of the latter, Plaintiff has refused to produce documents related to third
 20 parties' use of the Entrepreneur mark, including studies, surveys, expert reports,
 21 market research, focus groups and the like regarding its Entrepreneur mark, third
 22 party use of the term "entrepreneur," the likelihood of confusion between such
 23 marks, and any documents relating to any purported secondary meaning or acquired
 24 distinctiveness of the term "entrepreneur" (Request Nos. 7, 10-12, 14, 29 and

25 ¹ Plaintiff complains that Ariadne has not complied with L.R. 37-1. But
 26 Ariadne sent Plaintiff a detailed, nine-page letter identifying the numerous
 27 deficiencies with its production described herein and the applicable Federal Rules
 28 of Civil Procedure in view of which Plaintiffs' deficiencies were clear. The burden
 shifted to Plaintiff to explain why the discovery is inappropriate, which it has not
 done. *Oakes v. Halvorsen Marine Ltd.*, 179 F.R.D. 281, 283 (C.D. Cal. 1998).

1 Interrogatory No. 23). Such documents are relevant to any alleged likelihood of
 2 confusion. Plaintiff has likewise refused to produce documents relating to its past
 3 enforcement of the Entrepreneur mark, including communications with perceived
 4 infringers, filings and documents from legal proceedings, including expert reports,
 5 declarations, and testimony, testimony from Plaintiff's officers, employees, and
 6 agents, and relevant discovery and the complete record from any civil action or
 7 administrative proceeding related to its Entrepreneur and related marks (Request
 8 Nos. 22-26). These documents are also relevant to any likelihood of confusion.

9 Plaintiff has also refused to produce documents sufficient to show its
 10 revenues, expenditures, and any net profits or losses associated with the domestic
 11 and foreign promotion or provision of products or services under its Entrepreneur
 12 mark, despite the domestic documents' relevance to damages and to the strength of
 13 Plaintiff's Entrepreneur mark, and despite having put the foreign documents at
 14 issue through the allegations in its Complaint (Nos. 28 and 30). Plaintiff also
 15 refuses to produce its domestic trademark clearance searches for marks containing
 16 the term "entrepreneur" (No. 8) even though they are relevant to Ariadne's defense
 17 that Plaintiff's mark is descriptive and only entitled to limited, if any, protection, or
 18 its foreign trademark searches (*id.*), which Plaintiff put at issue in its Complaint.
 19 Plaintiff also unreasonably objects to producing documents that pertain to the facts
 20 and allegations contained in the pleadings, or that it intends to rely upon in this
 21 proceeding (Nos. 20 and 33), even though such documents encompass the very
 22 definition of permitted discovery. Finally, although Plaintiff asserts that it has
 23 "policies to retain documents in compliance with applicable state and federal laws
 24 pertaining to particular classes of documents," it refuses to produce those policies
 25 (No. 34), which are relevant in view of the deficiencies with Plaintiff's production.

26 Having failed to resolve the above disagreements during a May 20-21 meet-
 27 and-confer (Zambrzycki Decl., ¶10), Ariadne moves to compel Plaintiff to provide
 28 the requested discovery.

1 **II. EMI's Introduction**

2 Ariadne's discovery requests are overbroad, unreasonable, violate Rule 34,
 3 and amount to nothing more than a sweeping fishing expedition. Without
 4 complying with Local Rule 37, and on the eve of the discovery cut-off date,
 5 Ariadne has demanded that EMI produce virtually every document in EMI's or its
 6 predecessors' possession for its entire thirty-year history. Indeed, even though
 7 Ariadne first began using its trademark no earlier than 2008 (and claims to have
 8 first thought of the term no earlier than 2006), it nevertheless seeks documents from
 9 EMI dating back to 1978, and includes broad "catch-all" requests such as:

- 10 • All documents related to any facts, allegations, denials or affirmative
 defenses in the Complaint, as filed on December 14, 2012, or in
 Ariadne's Answer to the Complaint, as filed on March 21, 2013; and
- 11 • All documents relating to any secondary meaning or acquired
 distinctiveness of the term "entrepreneur"

12 Not content with seeking every document "related to" any fact, allegation, or
 13 defense in the operative pleadings, Ariadne also demands that EMI produce
 14 virtually every pleading, motion, discovery request, document produced,
 15 interrogatory answer, admission, expert report, survey, declaration, item of
 16 correspondence, trial transcript, deposition transcript, court order, etc. in every
 17 litigation, T.T.A.B. proceeding, administrative action, exchange of correspondence,
 18 and internal enforcement analysis involving the Entrepreneur® mark that EMI has
 19 been involved in at any point since 1978. Ariadne's only explanation as to the
 20 relevance of every document in every dispute going back 30 years is that such
 21 documents may relate to "likelihood of confusion."

22 While a portion of the documents from unrelated lawsuits certainly relate to
 23 likelihood of confusion *with a third party mark*, most of these documents do not
 24 meet that standard, and none of these documents relate to likelihood of confusion
 25 with the Entrepreneur Country mark.

1 In addition to requesting virtually every document EMI possesses, Ariadne
 2 also seeks to compel EMI to donate its legal analysis. Ariadne demands that EMI
 3 produce all documents that “relate or refer to any third party’s use of the
 4 Entrepreneur Mark or any variation thereof” for the past thirty years, all documents
 5 on which EMI intends to rely at the time of trial, all documents which show
 6 “secondary meaning” for the past thirty years, all documents relating to any claim
 7 in the Complaint, and all documents relating to or reflecting “enforcement” of the
 8 Entrepreneur® mark for the past thirty years. All of these requests require an
 9 attorney to perform a legal analysis in order to select and assemble documents, and
 10 any such assembly would instantly reveal protected work-product.

11 To be sure, Ariadne has not produced a single example of third party use of
 12 the Entrepreneur® mark, despite claiming that such evidence is part of its defenses.
 13 Instead, Ariadne apparently intends to require EMI and its attorneys to undertake
 14 that task, even though relevant third party uses are, by definition, uses that achieve
 15 recognition by the public and are fully available to Ariadne.

16 Despite waiting months to file this motion to compel, Ariadne cites almost no
 17 authority that supports compelling production in response to Ariadne’s requests.
 18 Rather than discuss the substance of its requests (which are often wildly overbroad
 19 on their face), Ariadne attempts to ascribe nefarious motives to EMI without a
 20 shred of evidence, accusing EMI of stringing Ariadne along and “cherry-picking”
 21 documents. The facts do not support these accusations.

22 EMI served discovery requests on Ariadne on October 1, 2013 and gave
 23 Ariadne several extensions to respond, amounting to over 75 days, such that the
 24 responses were not served until January 15, 2014. Declaration of Lucy Jewett
 25 Wheatley (attached hereto) ¶ 2. Ariadne did not produce any documents until
 26 February 14, 2014, despite having agreed in writing to produce documents on
 27 January 15, 2014. *Id.* ¶¶ 2-3. Ariadne refused to produce *any* documents relating to
 28 its goods, services, or revenues until EMI met and conferred with Ariadne under

1 L.R. 37-1, and served a joint stipulation on March 19, 2014. *Id.* ¶ 3.

2 Ariadne makes much of the number of documents EMI produced—
 3 essentially arguing that, by only producing “approximately 250 documents,” EMI
 4 must have engaged in bad practices. Ariadne neglects to mention that, in total, it
 5 has only produced *approximately 125 documents*, or one-half of the number of
 6 documents that EMI has produced.

7 While EMI has been diligently prosecuting this case, Ariadne opted not to
 8 serve any discovery requests until December 30, 2013, nearly three months after
 9 EMI served its written discovery requests. In responding to Ariadne’s discovery
 10 requests, EMI provided responses to Ariadne’s Interrogatories and Requests for
 11 Production on the agreed deadline, and then provided Ariadne with a rolling
 12 production, producing documents as they were located and assembled. This is a
 13 common practice, not an attempt to “string Ariadne along.”

14 For the present dispute, Ariadne failed to cite any authority in support of its
 15 position in its meet and confer letter, in violation of Local Rule 37-1. EMI still
 16 participated in meet and confers on May 20 and 21, 2014, during which EMI
 17 offered several compromises to attempt to resolve the dispute without motions
 18 practice. In violation of L.R. 37-2.1, Ariadne has not included “how it proposed to
 19 resolve the dispute over [each] issue at the conference of counsel,” likely because
 20 Ariadne refused to compromise on most of its unreasonable requests. EMI also
 21 sent Ariadne a letter detailing its position, and citing relevant authority on May 23,
 22 2014, attached as Exhibit B to the Wheatley Declaration. Ariadne did not respond
 23 to this letter, and waited a full month before serving EMI with the present Rule 37
 24 joint stipulation. Given Ariadne’s prior delays in responding to EMI’s discovery
 25 requests, and its current delays in connection with this motion, Ariadne cannot
 26 complain that EMI has delayed proceedings or tried to “run out the clock.” Instead,
 27 Ariadne served improper requests and now has decided, at the end of discovery and
 28 after its motion to dismiss was recently denied, to attempt to enforce those requests.

1 **III. Disputed Discovery**

2 **A. Request for Production Nos. 7, 10-12, 14, 29 and**
 3 **Interrogatory No. 23**

4 **Request for Production No. 7**

5 All documents relating to any studies, evaluations, surveys, expert reports,
 6 market research, focus groups, investigations, polls or other evaluations conducted
 7 or being conducted regarding the Entrepreneur Mark or any variation thereof.

8 **Objection to Request for Production 7**

9 EMI incorporates by reference each of its General Objections as though fully
 10 set forth herein. EMI objects to this request on the ground that it seeks information
 11 protected by the attorney-client privilege and the work product doctrine. EMI
 12 objects to this request as vague, not relevant, overbroad and unduly burdensome to
 13 the extent it seeks “all” documents, and not reasonably calculated to lead to the
 14 discovery of admissible evidence. EMI objects to this request to the extent it seeks
 15 expert disclosures prior to the expert closure deadline. Subject to and without
 16 waiving its objections, to the extent such documents exist, EMI will produce any
 17 non-privileged expert reports in this case in accordance with the Federal Rules.

18 **Request for Production No. 10**

19 All documents relating to any studies, evaluations, or surveys conducted or
 20 being conducted regarding use by others of the term “entrepreneur” or any variation
 21 thereof in connection with the promotion, advertising, or sale of any products or
 22 services, anywhere in the world.

23 **Objection to Request for Production 10**

24 EMI incorporates by reference each of its General Objections as though fully
 25 set forth herein. EMI objects to this request on the ground that it seeks information
 26 protected by the attorney-client privilege and the work product doctrine. EMI
 27 objects to this request as vague, not relevant, overbroad and unduly burdensome to
 28 the extent it seeks “all” documents, and not reasonably calculated to lead to the

1 discovery of admissible evidence. EMI objects to this request to the extent it seeks
 2 expert disclosures prior to the expert closure deadline. Subject to and without
 3 waiving its objections, to the extent such documents exist, EMI will produce any
 4 non-privileged expert reports in this case in accordance with the Federal Rules.

5 **Request for Production No. 11**

6 All documents relating to any studies, evaluations or surveys conducted or
 7 being conducted regarding consumer recognition of, or association with, the term
 8 “entrepreneur” or any variation thereof.

9 **Objection to Request for Production 11**

10 EMI incorporates by reference each of its General Objections as though fully
 11 set forth herein. EMI objects to this request on the ground that it seeks information
 12 protected by the attorney-client privilege and the work product doctrine. EMI
 13 objects to this request as vague, overbroad and unduly burdensome to the extent it
 14 seeks “all” documents, and not reasonably calculated to lead to the discovery of
 15 admissible evidence. EMI objects to this request to the extent it seeks expert
 16 disclosures prior to the expert closure deadline. Subject to and without waiving its
 17 objections, to the extent such documents exist, EMI will produce any non-
 18 privileged expert reports in this case in accordance with the Federal Rules.

19 **Request for Production No. 12**

20 All documents relating to any studies, evaluations or surveys conducted or
 21 being conducted regarding the likelihood of confusion of the Entrepreneur Mark or
 22 any variation thereof with any other designation, trademark, service mark, or trade
 23 name.

24 **Objection to Request for Production 12**

25 EMI incorporates by reference each of its General Objections as though fully
 26 set forth herein. EMI objects to this request on the ground that it seeks information
 27 protected by the attorney-client privilege and the work product doctrine. EMI
 28 objects to this request as vague, not relevant, overbroad and unduly burdensome to

1 the extent it seeks “all” documents, and not reasonably calculated to lead to the
 2 discovery of admissible evidence. EMI objects to this request to the extent it seeks
 3 expert disclosures prior to the expert closure deadline. Subject to and without
 4 waiving its objections, to the extent such documents exist, EMI will produce any
 5 surveys and expert reports in this case in accordance with the Federal Rules.

Request for Production No. 14

7 All documents relating to any secondary meaning or acquired distinctiveness
 8 of the term “entrepreneur” or any variation thereof.

Objection to Request for Production 14

10 EMI incorporates by reference each of its General Objections as though fully
 11 set forth herein. EMI objects to this request on the ground that it seeks information
 12 protected by the attorney-client privilege and the work product doctrine. EMI
 13 objects to this request on the ground that it seeks every magazine, book, and other
 14 use, of ENTREPRENEUR, by EMI. Thus, it is unintelligible and overbroad as
 15 drafted. Subject to and without waiving its objections, EMI will produce its U.S.
 16 trademark registrations for marks containing the term “entrepreneur,” and produce
 17 any surveys and expert reports in this case in accordance with the Federal Rules.

Request for Production No. 29

19 All documents that relate or refer to any third party’s use of the Entrepreneur
 20 Mark or any variation thereof.

Objection to Request for Production 29

22 EMI incorporates by reference each of its General Objections as though fully
 23 set forth herein. EMI objects to this request on the ground that it seeks information
 24 protected by the attorney-client privilege and the work product doctrine. EMI
 25 objects to this request as vague as to “relate or refer” and “any variation thereof,”
 26 overbroad and unduly burdensome, and not reasonably calculated to lead to the
 27 discovery of admissible evidence. Subject to and without waiving its objections, to
 28 the extent such documents exist, EMI will produce any non-privileged surveys and

1 expert reports in this case in accordance with the Federal Rules.

2 **Interrogatory No. 23**

3 Identify all expert reports, market studies, focus groups, surveys, reports,
 4 clearance reports, investigations, polls, or other evaluations obtained, made, or
 5 conducted by, on behalf of, or for the benefit of EMI, its agents, or third parties that
 6 refer or relate to the Entrepreneur Mark or any variation thereof.

7 **Response to Interrogatory No. 23**

8 EMI incorporates by reference each of its General Objections as though fully
 9 set forth herein. EMI objects to this interrogatory on the ground that it seeks
 10 information protected by the attorney-client privilege and the work product
 11 doctrine. EMI objects to this request as compound, vague, not relevant, overbroad
 12 and unduly burdensome to the extent it seeks to identify “all” documents, and not
 13 reasonably calculated to lead to the discovery of admissible evidence. EMI objects
 14 to this interrogatory as compound. EMI objects to this request to the extent it seeks
 15 expert disclosures prior to the expert closure deadline. Subject to and without
 16 waiving its objections, to the extent such documents exist, EMI will produce any
 17 surveys and expert reports in this case in accordance with the Federal Rules.

18 **1. Ariadne’s Position**

19 The discovery sought in these Requests and Interrogatory includes any
 20 communications, studies, evaluations, surveys, expert reports, market research,
 21 focus groups, investigations, polls or other evaluations conducted or being
 22 conducted regarding:

- 23 • the Entrepreneur mark or any variation thereof (Request No. 7,
 24 Interrogatory No. 23);
- 25 • use by others of the term “entrepreneur” or any variation thereof in
 26 connection with the promotion, advertising, or sale of any products or
 27 services (Request No. 10);
- 28 • consumer recognition of, or association with, the term “entrepreneur”

- 1 or any variation thereof (Request No. 11);
 2 • the likelihood of confusion of the Entrepreneur mark or any variation
 3 thereof with any other designation, trademark, service mark, or trade
 4 name (Request No. 12);
 5 • any secondary meaning or acquired distinctiveness of the term
 6 “entrepreneur” or any variation thereof (Request No. 14); and
 7 • any third party’s use of the Entrepreneur mark or any variation thereof
 8 (Request No. 29).

9 These requests are plainly relevant to the factors underlying a likelihood of
 10 confusion determination between Plaintiff’s mark and Ariadne’s mark, which
 11 incorporates the term “entrepreneur.” *See Rearden LLC v. Rearden Commerce,*
 12 *Inc.*, 683 F.3d 1190, 1198 (9th Cir. 2012) (identifying, *inter alia*, the differences of
 13 the goods and services involved; the respective marketing channels; the weakness
 14 of Plaintiff’s mark; the lack of actual confusion by customers; the degree of care
 15 likely to be exercised by the consumer; and the unlikelihood of expansion of the
 16 product lines as factors used in determining whether confusion is likely); *e.g.*,
 17 *Frehling Enters. v. Int'l Select Group, Inc.*, 192 F.3d 1330, 1336 (11th Cir. 1999)
 18 (“Also important in gauging the strength of a mark is the degree to which third
 19 parties make use of the mark.”).

20 Plaintiff’s response that it will only produce “any surveys and expert reports
 21 in *this case* in accordance with the Federal Rules” is insufficient. Simply because
 22 surveys, studies, evaluations, market research, or the like were not prepared for the
 23 purposes of *this* litigation but were instead previously prepared, prepared in
 24 connection with other litigations, or prepared in the ordinary course of business,
 25 does not make them irrelevant. Regardless of the circumstances in which they were
 26 created, any non-privileged surveys, evaluations, market research and the like
 27 regarding Plaintiff’s Entrepreneur mark are relevant to the likelihood of confusion
 28 factors enumerated above. *See Rearden*, 683 F.3d at 1198. Similarly, because

1 Plaintiff's mark is merely "descriptive" and "others in the marketplace [need] to use
 2 the term 'entrepreneur' to describe their goods or services," *Entrepreneur Media*,
 3 279 F.2d at 1143, any prior surveys, evaluations, research and the like concerning
 4 other marks using the term "entrepreneur" are likewise relevant to the likelihood of
 5 confusion analysis between Plaintiff's Entrepreneur mark and Ariadne's mark,
 6 which uses the term "entrepreneur." Plaintiff has offered no authority to indicate
 7 that discovery into such matters should not be permitted, despite it being Plaintiff's
 8 burden to do so. *Oakes*, 179 F.R.D. at 283.

9 Instead, Plaintiff has offered the self-serving "compromise" that it would
 10 produce disclosed expert reports *produced by or on Plaintiff's behalf* relating to its
 11 Entrepreneur mark, dating back to 2006. But Ariadne's requests are not limited
 12 only to expert reports, much less self-serving ones that were produced by Plaintiff
 13 or on its behalf. Nor should Plaintiff be permitted to limit its production to 2006, as
 14 documents predating that year are relevant to demonstrating, *inter alia*, that
 15 Plaintiff's mark has become weaker over time; the lack of actual confusion by
 16 customers between Plaintiff's mark and other marks utilizing the term
 17 "entrepreneur" throughout the entire time Plaintiff's mark has been registered; and
 18 the unlikelihood of Plaintiff's expansion of its product line into Ariadne's. Because
 19 they are relevant, Plaintiff should be required to produce all of the requested
 20 documents that are within its possession, custody, or control responsive to these
 21 Requests and Interrogatory. Fed. R. Civ. P. 34.

22 Finally, Plaintiff has complained in correspondence to Ariadne that these
 23 Requests "would likely implicate numerous Protective Orders from unrelated
 24 lawsuits." As an initial matter, Plaintiff did not raise this objection in its responses
 25 to Request Nos. 7, 10-12, 14, 29 or Interrogatory No. 23 and it is therefore waived.
 26 *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1473 (9th Cir.
 27 1992) ("It is well established that a failure to object to discovery requests within the
 28 time required constitutes a waiver of any objection."). Moreover, to the extent any

1 of the requested information is subject to a Protective Order, if it is Plaintiff's own
 2 information, there is nothing preventing Plaintiff from disclosing that information
 3 in this case. If the requested information contains a third-party's protected
 4 information, Plaintiff could produce documents with the third-party's information
 5 redacted, thus addressing any purported confidentiality needs while satisfying its
 6 discovery obligations. Plaintiff should also produce the corresponding Protective
 7 Order(s) purportedly at issue, rather than merely its say so as to the allegedly
 8 confidential nature of certain information.

9 **2. EMI's Position**

10 Requests 7, 10, 11, 12, and 23

11 EMI has already produced market research relating to Entrepreneur Magazine,
 12 as requested by Requests 7 and 11. *See* Wheatley Decl. ¶ 9. The remaining
 13 requests by Ariadne listed above are overbroad and seek documents that are not
 14 relevant and not reasonably calculated to lead to admissible evidence. While
 15 Ariadne denigrates EMI's requested compromises, tellingly Ariadne does not "state
 16 how it proposed to resolve the dispute," as required by Local Rule 37-2.1.

17 Requests 7, 10, 11, 12, and 23 seem to request any expert reports from past
 18 litigations or any other proceeding. These requests are unlimited as to the time
 19 period, and Ariadne's counsel stated that the relevant time period dates back to the
 20 creation of the Entrepreneur® mark, *over thirty years ago*. Ariadne has made no
 21 showing that any expert reports from past litigations would be relevant to the
 22 present dispute, nor can it—likelihood of confusion is a fact intensive case-by-case
 23 determination, such that past evaluations of a mark are not relevant. *Paul Sachs*
Originals Co. v. Sachs, 325 F.2d 212, 214 (9th Cir. 1963) ("In determining
 24 likelihood of confusion, examination of prior cases is not very helpful except
 25 insofar as they indicate factors to be considered. . . . each case must stand on its
 26 own facts. "). Any past surveys would relate to the goods and services offered by
 27 EMI or another party at that time, would pertain to the particular trademarks at
 28

1 issue, and would reflect consumer opinions at that particular time, variable factors
 2 that would render the results meaningless, and certainly inadmissible. *See*
 3 Reference Manual on Scientific Evidence, 240-41 (Federal Judicial Center 2000)
 4 (noting that “[t]he definition of the relevant population is crucial because there may
 5 be systematic differences in the responses of members of the population and
 6 nonmembers” [and] “[a] survey that provides information about a wholly irrelevant
 7 universe of respondents is itself irrelevant.”); *S.E.C. v. Retail Pro, Inc.*, No. 08-cv-
 8 1620, 2011 U.S. Dist. LEXIS 111322, at *12 (S.D. Cal. Sept. 28, 2011) (“[The
 9 expert’s] opinion regarding a defendant’s mental state or lack of fraud in an
 10 unrelated case was not relevant or permissible.”). To the extent any past reports or
 11 surveys show third party use, past third party use is not relevant, and Ariadne has
 12 equal access to evidence of current third party use.

13 Ariadne further claims that stale expert reports or surveys would be relevant
 14 to likelihood of confusion. Any past reports or surveys, however, would only be
 15 relevant to likelihood of confusion with respect to the marks at issue in those
 16 particular proceedings at that time. EMI’s rejected compromise to avoid burdening
 17 this Court with unnecessary motion practice was to provide any of its surveys or
 18 expert reports dating back to 2006—back to when Entrepreneur Country first came
 19 into existence—even though such documents are not relevant to this case. While
 20 old expert reports might allow Ariadne’s counsel, or its retained expert, to use past
 21 attorney and expert work product to guide their current strategy, a desire to free-
 22 ride off of EMI’s prior work product, and the work product of third-parties does not
 23 constitute acceptable grounds for discovery. *FMC Corp. v. Vendo Co.*, 196 F.
 24 Supp. 2d 1023, 1048 (E.D. Cal. 2002) (“There is a strong policy against permitting
 25 a non-diligent party from free-riding off the opponent’s industry and diligence.”).

26 Nor does Ariadne’s claim that Plaintiff’s mark is descriptive support granting
 27 the requested discovery. First, EMI’s Entrepreneur® mark is incontestable, and
 28 thus “descriptiveness” is not an available defense in this action. *Park ‘N Fly v.*

1 *Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327 (1985) (holding that that the
 2 owner of a registered mark may rely on incontestability to enjoin infringement, and
 3 that an incontestable registration, therefore, cannot be challenged on the ground that
 4 the mark is merely descriptive). Second, surveys from past years pertaining to *past*
 5 third party use will not relate to whether the mark is *currently* descriptive.
 6 Ariadne's utterly unsupported contention that "Plaintiff's marks have become
 7 weaker over time" does not support discovery of old expert reports.

8 Requests 14 and 29

9 Requests 14 and 29 are vastly overbroad, request attorney work-product, and
 10 do not request specific categories of documents as required by Rule 34.

11 Request 14 seeks: "All documents relating to any secondary meaning or
 12 acquired distinctiveness of the term 'entrepreneur' or any variation thereof." As
 13 EMI explained in its response, this request encompasses every document in EMI's
 14 possession that uses the Entrepreneur® mark, which amounts to essentially every
 15 document in EMI's possession, going back over 30 years. EMI cannot possibly
 16 comply with such an unreasonable and unfocused request. Indeed, this request
 17 lacks the "reasonable particularity" required by the Federal Rules. *See Taylor v.*
 18 *O'Hanneson*, 2014 U.S. Dist. LEXIS 81269, at *7 (E.D. Cal. June 13, 2014) ("The
 19 test for reasonable particularity is whether the request places a party upon
 20 'reasonable notice of what is called for and what is not.'") (citing *Bruggeman v.*
 21 *Blagojevich*, 219 F.R.D. 430, 436 (N.D Ill. 2004)).

22 To the extent Ariadne expects EMI's in-house or outside counsel to pick
 23 and choose documents that are the "best" evidence of secondary meaning or
 24 acquired distinctiveness, this request is a clear invasion of work-product privilege.
 25 Selecting which documents best reflect secondary meaning requires legal analysis,
 26 and producing a subset of these documents would reveal that analysis. *U.S. v. TRW,*
 27 *Inc.*, 212 F.R.D. 554, 563 (C.D. Cal. 2003) ("Where the selection, organization, and
 28 characterization of facts reveals the theories, opinions, or mental impressions of a

1 party or the party’s representative, that material qualifies as opinion work
 2 product.”) The relevance of this request is also unclear—it is incontestable that
 3 EMI’s Entrepreneur® mark has secondary meaning and is enforceable.

4 Request 29 is similarly problematic in requesting “all documents that relate
 5 or refer to any third party’s use of the Entrepreneur Mark or any variation thereof.”
 6 First, this request seeks documents that are not relevant. The Ninth Circuit has held
 7 that unrelated potential infringers are not relevant to a trademark infringement
 8 claim. *Eclipse Associates Ltd. v. Data Gen. Corp.*, 894 F.2d 1114, 1119 (9th Cir.
 9 1990) (“Appellant also argued that the district court erred in excluding the
 10 testimony of various third-party users of the mark ECLIPSE. EAL attempted to
 11 introduce into evidence five deposition transcripts describing the use of the mark
 12 ECLIPSE for goods unrelated to the computer field. Evidence of other unrelated
 13 potential infringers is irrelevant to claims of trademark infringement and unfair
 14 competition under federal law.”). Worse, to the extent that Ariadne seeks *past*
 15 third-party use (going back 30 years), such evidence cannot possibly have any
 16 bearing on current use or the current strength of EMI’s mark.

17 In addition, responding to this request requires that EMI’s attorneys evaluate
 18 what constitutes a “third party use of the Entrepreneur Mark,” as this is a legal
 19 concept, not a specific category of documents that EMI can gather. EMI’s selection
 20 of what constitutes a third party use will inevitably reveal the mental impressions of
 21 EMI’s attorneys. See *TRW, Inc.*, 212 F.R.D. at 563. If Ariadne wants examples of
 22 third party uses that are accessible to and create an impression on the public,
 23 Ariadne is perfectly capable of collecting its own evidence, to the extent it exists.
 24 *Smith v. Wal-Mart Stores, Inc.*, 475 F. Supp. 2d 1318, 1323 (N.D. Ga. 2007)
 25 (holding that defendant was equally well-positioned to collect examples of third-
 26 party use as was the plaintiff).

27
 28

1 **B. Request for Production Nos. 22-26**

2 **Request for Production No. 22**

3 All documents reflecting or relating to enforcement of the Entrepreneur Mark
 4 or any variation thereof, including but not limited to internal memoranda and other
 5 documents, enforcement demands and correspondence with perceived infringers,
 6 copies of any documents filed or served in legal proceedings, and all documents
 7 related to settlement of any infringement claims.

8 **Objection to Request for Production 22**

9 EMI incorporates by reference each of its General Objections as though fully
 10 set forth herein. EMI objects to this request on the ground that it seeks information
 11 protected by the attorney-client privilege and the work product doctrine. EMI
 12 objects to this request as vague as to “enforcement,” not relevant, overbroad and
 13 unduly burdensome to the extent it seeks “all” documents, and not reasonably
 14 calculated to lead to the discovery of admissible evidence.

15 **Request for Production No. 23**

16 All expert reports, declarations, deposition and trial testimony provided by
 17 any experts retained by EMI in any civil action or trademark administrative
 18 proceeding concerning the Entrepreneur Mark or any variation thereof.

19 **Objection to Request for Production 23**

20 EMI incorporates by reference each of its General Objections as though fully
 21 set forth herein. EMI objects to this request on the ground that it seeks information
 22 protected by the attorney-client privilege and the work product doctrine. EMI
 23 objects to this request as not relevant, overbroad and unduly burdensome to the
 24 extent it seeks “all” documents, and not reasonably calculated to lead to the
 25 discovery of admissible evidence. EMI objects to this request to the extent it seeks
 26 documents covered by Protective Orders in other lawsuits. EMI objects to this
 27 request to the extent it seeks expert disclosures prior to the expert closure deadline.

1 Subject to and without waiving its objections, to the extent such documents exist,
 2 EMI will produce any non-privileged surveys and expert reports in this case in
 3 accordance with the Federal Rules.

4 **Request for Production No. 24**

5 All deposition and trial testimony provided by EMI or any of its current or
 6 former officers, directors, employees, agents, or managers in any way concerning
 7 the Entrepreneur Mark or any variation thereof in any civil action or trademark
 8 administrative proceeding.

9 **Objection to Request for Production 24**

10 EMI incorporates by reference each of its General Objections as though fully
 11 set forth herein. EMI objects to this request on the ground that it seeks information
 12 protected by the attorney-client privilege and the work product doctrine. EMI
 13 objects to this request to the extent it seeks documents covered by Protective Orders
 14 in other lawsuits. EMI objects to this request as not relevant, overbroad and unduly
 15 burdensome to the extent it seeks “all” documents, and not reasonably calculated to
 16 lead to the discovery of admissible evidence.

17 **Request for Production No. 25**

18 The complete record, including all deposition and trial testimony and all
 19 admitted exhibits, in any trademark action that EMI has brought concerning the
 20 Entrepreneur Mark or any variation thereof, including but not limited to the trial
 21 record in Entrepreneur Media, Inc. v. Scott Smith, d/b/a EntrepreneurPR.

22 **Objection to Request for Production 25**

23 EMI incorporates by reference each of its General Objections as though fully
 24 set forth herein. EMI objects to this request on the ground that it seeks information
 25 protected by the attorney-client privilege and the work product doctrine. EMI
 26 objects to this request to the extent it seeks documents covered by Protective Orders
 27 in other lawsuits. EMI objects to this request as not relevant, overbroad and unduly
 28 burdensome to the extent it seeks “all” documents, and not reasonably calculated to

1 lead to the discovery of admissible evidence.

2 **Request for Production No. 26**

3 All written discovery responses and all documents provided by any party in
 4 discovery in the action entitled Entrepreneur Media, Inc. v. Scott Smith, d/b/a
 5 EntrepreneurPR.

6 **Objection to Request for Production 26**

7 EMI incorporates by reference each of its General Objections as though fully
 8 set forth herein. EMI objects to this request to the extent it seeks documents
 9 covered by Protective Orders in other lawsuits. EMI objects to this request as not
 10 relevant, overbroad and unduly burdensome to the extent it seeks “all” documents,
 11 and not reasonably calculated to lead to the discovery of admissible evidence.

12 **1. Ariadne’s Position**

13 The discovery sought in these Requests includes:

- 14 • documents relating to Plaintiff’s enforcement of the Entrepreneur
 mark, including documents related to settlement of any infringement
 claims (Request No. 22);
- 15 • expert reports, declarations, deposition and trial testimony provided by
 any experts retained by Plaintiff in any civil action or administrative
 proceeding concerning the Entrepreneur mark or any variation thereof
 (Request No. 23);
- 16 • deposition and trial testimony provided by Plaintiff or any of its
 current or former officers, directors, employees, agents, or managers in
 any way concerning the Entrepreneur mark or any variation thereof in
 any civil trademark action or administrative proceeding (Request No.
 24);
- 17 • the complete record, including all deposition and trial testimony and
 all admitted exhibits in any trademark action that Plaintiff has brought
 concerning the Entrepreneur mark or any variation thereof, including

1 but not limited to the trial record in *Entrepreneur Media, Inc. v. Scott*
 2 *Smith, d/b/a EntrepreneurPR* (Request No. 25); and
 3 • all written discovery responses and documents provided by any party
 4 in discovery in *Entrepreneur Media, Inc. v. Scott Smith, d/b/a*
 5 *EntrepreneurPR* (Request No. 26).

6 Each of these Requests is plainly relevant to the instant matter as any
 7 trademark infringement litigation, enforcement proceeding, administrative
 8 proceeding, or settlement agreement involving Plaintiff's Entrepreneur mark and
 9 another party's mark containing the term "entrepreneur" will have involved many
 10 of the same issues disputed in this case. *See Rearden*, 683 F.3d at 1198
 11 (identifying, *inter alia*, the differences of the goods and services involved; the
 12 respective marketing channels; the weakness of Plaintiff's mark; the lack of actual
 13 confusion by customers; the degree of care likely to be exercised by the consumer;
 14 and the unlikelihood of expansion of the product lines as factors used in
 15 determining whether confusion is likely); *see also Frehling*, 192 F.3d at 1336
 16 ("Also important in gauging the strength of a mark is the degree to which third
 17 parties make use of the mark."). Notably, Plaintiff attached copies of decisions
 18 from the Central District of California and from the Ninth Circuit in the
 19 *Entrepreneur Media, Inc. v. Scott Smith, d/b/a EntrepreneurPR* case with its initial
 20 letter to Ariadne asserting trademark infringement, despite now claiming without
 21 merit that that action has no relevance here. Zambrzycki Decl., ¶16.

22 In particular, previous admissions from Plaintiffs' officers, directors, and the
 23 like regarding Plaintiff's Entrepreneur mark, others' use of the term "entrepreneur"
 24 in their marks, and any competition between Plaintiff's goods and services under its
 25 Entrepreneur mark and those of others under their marks containing the term
 26 "entrepreneur" will be highly relevant to the likelihood of confusion analysis
 27 between Plaintiff's Entrepreneur mark and Ariadne's mark, which also uses the
 28 term "entrepreneur." Ariadne expects that Plaintiff's officers and employees who

1 testified in previous trademark actions on its behalf are likely to testify in this case;
2 in addition, Ariadne needs their former testimony to prepare for their expected
3 testimony in this case and to learn information relevant to the strength of Plaintiff's
4 asserted Entrepreneur mark.

Again, Plaintiff has offered no authority to indicate that discovery into such matters—including into the very trademark that Plaintiff is presently asserting, or other accused marks containing the descriptive term “entrepreneur”—should not be permitted, despite it being Plaintiff’s burden to do so. *Oakes*, 179 F.R.D. at 283.²

In correspondence with Ariadne, Plaintiff has additionally suggested that it need not produce any of the requested documents because “Ariadne can use the same means to find many of those documents that [Plaintiff] would use—going to Pacer or the relevant court’s physical files.” This objection is baseless as Plaintiff or its counsel presumably maintain records of their previous suits and proceedings and are obligated to produce responsive documents that are within their possession, custody, or control. Fed. R. Civ. P. 34. Plaintiff should be required to produce the full scope of discovery sought in these Requests.

Finally, as with Document Request Nos. 7, 10-12, 14, 29 and Interrogatory No. 23, Plaintiff again complains that Request Nos. 22-26 may implicate numerous Protective Orders from other lawsuits. But as stated with respect to those previous Requests and Interrogatory, Protective Orders should not prevent Plaintiff from disclosing its own allegedly protected information and any purportedly confidential third-party information can be redacted. Moreover, Plaintiff should be required to produce any Protective Order(s) purportedly at issue to establish the allegedly confidential nature of the information it seeks to withhold.

² In correspondence to Ariadne, Plaintiff has cited to three wholly-inapposite, non-trademark cases without any effort to explain how the irrelevant facts of those cases have any bearing on the instant dispute.

1 **2. EMI's Position**

2 **Ariadne's Request for Cloned Discovery is Irrelevant and Improper**

3 Ariadne's requests 23-26 demand that EMI produce virtually every document
 4 from every litigation over the past thirty years that involved the Entrepreneur®
 5 mark (which is, of course, EMI's primary brand). Ariadne provides no explanation
 6 as to how these documents would be relevant except to assert they somehow relate
 7 to likelihood of confusion. However, likelihood of confusion is a case-by-case
 8 determination that is entirely dependent on the particular facts of each dispute.
 9 *Sachs*, 325 F.2d at 214. As discussed above, cases regarding a likelihood of
 10 confusion with other marks from thirty years ago have no possible bearing on the
 11 present dispute. Such a production will entail EMI having to locate and produce a
 12 vast number of documents that are totally irrelevant.

13 When courts in this Circuit have considered such "cloned discovery"
 14 requests, they have found that such requests are improper. For example, in *King*
 15 *County v. Merrill Lynch & Co.*, 2011 U.S. Dist. LEXIS 86775 (W.D. Wash., Aug.
 16 5, 2011), a party requested all documents related to certain previous investigations
 17 and litigations related to a similar subject matter as was at issue in their proceeding.
 18 On a motion to compel, the court held: "discovery requests that seek duplicates of
 19 discovery produced in other litigation is improper as failing to make the requisite
 20 showing of relevance." *Id.* at *7. Citing other cases, the Court went on to note that
 21 such requests do not make the baseline showing of relevance required under the
 22 Federal Rules. *Id.* at *7-*8. Such requests are only relevant where the fact that
 23 certain documents were produced has a bearing on claims and defenses in the case.
 24 *Id.* That is not the case here. The *King County* Court went on to find that it was
 25 insufficient that some of the documents, or even all of the documents, were likely to
 26 be relevant:

27 Although some portion of documents encompassed by
 28 Plaintiffs' request may be relevant, the Court has no
 method of determining which of those documents are

1 relevant, and which are not. It may very well be that each
 2 and every document produced in the government
 3 investigations is relevant to Plaintiff's claims. However,
 4 Plaintiff must make proper discovery requests, identifying
 the specific categories of documents sought, in order to
 obtain them -- and each category must be relevant to its
 claims and defenses.

5 *Id.* at *8.

6 With respect to documents that are publicly available on Pacer or from court
 7 archives, it is actually considerably less burdensome for Ariadne to obtain those
 8 documents than it is for EMI to do so. Ariadne can simply do a search on Pacer for
 9 EMI trademark cases, and then download all of the available documents, or (more
 10 likely) download the specific documents that Ariadne is particularly interested in
 11 reviewing. EMI however, must search its digital files and paper archives, and then
 12 direct its outside counsel to do the same. [REDACTED]

13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED] Given that Ariadne has failed to
 make any showing that such documents are even relevant, the "the burden or
 expense of the proposed discovery outweighs its likely benefit." Fed. R.
 26(b)(2)(C). If Ariadne wishes to conduct a fishing expedition through old case
 files, it, and not EMI, should bear the cost of such an expedition.

25 Request 22, which encompasses all correspondence with alleged infringers,
 26 all internal memoranda, any other enforcement documents and all settlement
 27 agreements between EMI and third parties, also seeks non-relevant documents and
 28 is overbroad and unduly burdensome. These documents have no relevance to

1 EMI's or Ariadne's claims or defenses—the requests specifically seek documents
2 related to potential or actual infringement by *third parties* dating back years.

To the extent Ariadne asserts that such documents are relevant to the subject matter of this lawsuit, *i.e.* the Entrepreneur® Mark, as the party seeking discovery beyond the claims and defenses in this case, Ariadne bears the burden to show good cause to compel production. Fed. R. Civ. P 26(b). Ariadne has not met this burden because the only information these enforcement documents could possibly provide is an insight into what companies EMI chooses to send letters to, which amounts to EMI’s legal strategy and attorney mental impressions. Furthermore, settlement agreements and related correspondence are generally confidential, and would certainly not be admissible at trial, and would not lead to admissible evidence. Without a showing of good cause to compel the production of such documents, such requests are routinely denied. *See Therapeutic Research Faculty v. NBTY, Inc.*, 2006 U.S. Dist. LEXIS 89172, at *2-*5 (E.D. Cal. Nov. 20, 2006) (denying motion to compel “enforcement actions, including but not limited to lawsuits filed or contemplated, investigations, settlement agreements, and/or cease and desist actions, taken by Plaintiff” relating to the publications at issue in this action” where no showing was made that such documents were relevant); *see also Cook v. Yellow Freight Sys., Inc.*, 132 F.R.D. 548, 554 (E.D. Cal. 1990) (denying motion to compel discovery of settlement-related documents), overruled on other grounds by *Jaffee v. Redmond*, 518 U.S. 1, 116 S. Ct. 1923 (1996).

With respect to Requests 25-26, which seek the complete record (including the trial record) and all discovery from *EMI v. Smith*, a case from *over ten years ago*, Ariadne has not identified any reasons why that case is relevant to the present proceeding.³ Because the trial record and discovery from an entirely unrelated case

³ The fact that EMI pointed out, in an initial cease and desist letter, that the Ninth Circuit ruled that EMI's mark is valid in the *Smith* case does not alter the analysis.

1 involving a third party is not relevant to any claim or defense at issue here, Ariadne
 2 bears the burden to show “good cause” for compelling production. Since Ariadne
 3 has not provided any explanation for this request, it has failed to meet that burden.

4 **C. Request for Production Nos. 28 and 30**

5 **Request for Production No. 28**

6 Documents sufficient to show, by year and country, the revenue and net
 7 profits (or losses) associated with the promotion, marketing, advertising, or
 8 provision of each and every product or service using the Entrepreneur Mark or any
 9 variation thereof, other than Entrepreneur Magazine.

10 **Objection to Request for Production 28**

11 EMI incorporates by reference each of its General Objections as though fully
 12 set forth herein. EMI objects to this request as vague as to “the revenue and net
 13 profits (or losses) associated with the promotion, marketing, advertising, or
 14 provision of” and “any variation thereof,” not relevant, overbroad and unduly
 15 burdensome to the extent it seeks documents sufficient to show “each and every
 16 product or service,” and seeks documents outside of the United States, and not
 17 reasonably calculated to lead to the discovery of admissible evidence.

18 **Request for Production No. 30**

19 Documents sufficient to show EMI’s advertising or promotional
 20 expenditures, by quarter or month, covering advertising or promotions that utilize
 21 the Entrepreneur Mark.

22 **Objection to Request for Production 30**

23 EMI incorporates by reference each of its General Objections as though fully
 24 set forth herein. EMI objects to this request as vague as to “promotional” and
 25 “utilize the Entrepreneur Mark,” overbroad and unduly burdensome as it is not
 26 limited to the United States and is not limited in time, and not reasonably calculated
 27 to lead to the discovery of admissible evidence. Subject to and without waiving its
 28

1 objections, EMI will produce documents sufficient to reflect the information
 2 provided in EMI's response to Interrogatory 4.

3 **1. Ariadne's Position**

4 Request Nos. 28 and 30 seek documents sufficient to show Plaintiff's
 5 revenues, expenditures, and any net profits or losses associated with the domestic
 6 and foreign promotion or provision of products or services under its Entrepreneur
 7 mark. This information is relevant to determining Plaintiff's marketing channels,
 8 the weakness of Plaintiff's mark, the lack of overlap in the goods and services
 9 involved, the unlikelihood of expansion of the product lines, and any purported
 10 damages as well as the relief sought. *See Rearden*, 683 F.3d at 1198; e.g., *Amstar*
 11 *Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 262 (5th Cir. 1980) ("Dissimilarities
 12 between the retail outlets for and the predominant consumers of plaintiff's and
 13 defendants' goods lessen the possibility of confusion, mistake, or deception."); *id.*
 14 ("[D]issimilarities between plaintiff's and defendants' advertising campaigns tend
 15 to negate any inference of unfair competition or trademark infringement.").
 16 Plaintiff has offered no authority in support of its refusal to produce the requested
 17 documents, despite it being Plaintiff's burden to do so. *Oakes*, 179 F.R.D. at 283.

18 Although Plaintiff claims to have produced "detailed documents showing
 19 paid circulation and advertising, including pricing dating back to 2001 through
 20 2013," such information is limited to Plaintiff's print magazine. Plaintiff has not
 21 provided information regarding marketing expenses for any other products or
 22 services and has only provided limited revenue information for its other printed
 23 publications, which it claims to have provided going back to January 2009.

24 In addition, Plaintiff should not be permitted to impose arbitrary date cutoffs
 25 on its production, as Ariadne is entitled to discovery of Plaintiff's marketing and
 26 revenue figures during the entire period in which Plaintiff has used its Entrepreneur
 27 mark in connection with establishing the weakness of Plaintiff's mark, the lack of
 28 overlap in the goods, services, and marketing channels, and the unlikelihood of

1 expansion of the product lines. Moreover, Plaintiff has provided no revenues or
 2 expenses whatsoever related to its own website or non-print related goods or
 3 services, which are more relevant to this dispute, in which Plaintiff has named
 4 Ariadne's website—and not any printed publication—as the purportedly infringing
 5 instrumentality.⁴ Plaintiff should be required to provide the full scope of documents
 6 sought in these Requests.

7 **2. EMI's Position**

8 EMI has already produced documents sufficient to show its marketing and
 9 revenue numbers dating back to 2009, which should be sufficient given that
 10 Ariadne has not shown that it sold any goods or services bearing the
 11 EntrepreneurCountry mark prior to June 2008. Wheatley Decl. ¶ 11. EMI also, in
 12 the context of the parties' meet and confer, offered to produce several additional
 13 years to the extent available, dating back to 2006 or 2008, the first years Ariadne
 14 alleges it conceived of and used the mark EntrepreneurCountry (not an "arbitrary"
 15 cut-off). Ariadne rejected this compromise, and offered no compromise of its own,
 16 instead insisting it needs EMI's revenues and marketing expenses dating back to the
 17 creation of the Entrepreneur® mark, over thirty years ago. There is no basis for
 18 such an extraordinarily broad request.

19 Documents showing revenue numbers or advertising expenditures dating
 20 back to before the existence of Entrepreneur Country are not relevant to any claim
 21 or defense in this case. While Ariadne's revenues are relevant to damages, EMI's
 22 revenues and advertising expenditures only possibly go to show the strength of the
 23 Entrepreneur® mark. The strength of the Entrepreneur® mark is only relevant
 24 during the period of infringement at issue in this case, and Ariadne's documents
 25 show that no revenue was earned using the EntrepreneurCountry mark until June

26 ⁴ In addition to being relevant for all the reasons already described, Plaintiff's
 27 foreign marketing and revenue figures are additionally relevant as Plaintiff put them
 28 at issue in its Complaint. Zambrzycki Decl., Ex. A, Complaint, ¶¶8-9, 13.

1 2008. Wheatley Decl. ¶ 8. Assuming the truth of Ariadne's repeated statements
 2 that it did not conceive of the Entrepreneur Country mark prior to 2006 at the
 3 earliest (Dkt. 26 at pg. 3), there could be no likelihood of confusion prior to that
 4 date—and thus EMI's revenues prior to that date are not relevant.

5 Ariadne's statement that "Plaintiff has provided no revenues or expenses
 6 whatsoever related to its own website or non-print related goods or services" is flat
 7 wrong. EMI produced exact numbers for its online services and digital
 8 subscriptions dating back to 2009. Wheatley Decl. ¶ 11. EMI also produced
 9 spreadsheets separating out and showing total revenues and advertising
 10 expenditures for Entrepreneur.com, Entrepreneur magazine, Entrepreneur Press
 11 (books), list rental, international licensing of branded products, reprints, and
 12 Mexican operations, divided by year. *Id.* EMI has also produced years of detailed
 13 documents showing sales numbers for books, audio guides, advertising and other
 14 goods and services dating. *Id.* ¶ 11. Thus Ariadne's false claims that EMI has not
 15 produced data for goods and services other than its print magazine cannot serve as a
 16 basis for compelling further production by EMI.

17 **D. Request for Production No. 8**

18 **Request for Production No. 8**

19 All trademark clearance searches done for any mark containing the term
 20 "entrepreneur," or any variation thereof, in any country.
 21

22 **Objection to Request for Production 8**

23 EMI incorporates by reference each of its General Objections as though fully
 24 set forth herein. EMI objects to this request on the ground that it seeks information
 25 protected by the attorney-client privilege and the work product doctrine. EMI
 26 objects to this request as vague as to "or any variation thereof." This request, which
 27 is not limited to the United States, and is not limited in time, seeks information that
 28 is not relevant and not reasonably calculated to lead to the discovery of admissible

1 evidence.

2 **1. Ariadne's Position**

3 Plaintiff has objected to producing its trademark searches for marks
 4 containing the term "entrepreneur." But such searches are relevant to establishing
 5 the weakness of Plaintiff's mark and the narrow scope, if any, to which it is
 6 entitled, as they will demonstrate the multiple uses of the term "entrepreneur" in
 7 commerce as well as Plaintiff's knowledge of such widespread use. *E.g., Frehling*,
 8 192 F.3d at 1336 ("Also important in gauging the strength of a mark is the degree
 9 to which third parties make use of the mark.").⁵ Having failed to meet its burden of
 10 demonstrating why such discovery should not be permitted, *Oakes*, 179 F.R.D. at
 11 283, Plaintiff should be compelled to produce documents responsive to this
 12 Request.⁶

13 **2. EMI's Position**

14 EMI's trademark clearance searches are not relevant to any claim or defense
 15 in this action. Ariadne claims that trademark clearance searches will show third
 16 party use. It is wrong. It is well-established that an application or registration for a
 17 trademark is not evidence of use. *See McCarthy on Trademarks and Unfair*
 18 *Competition*, Fourth Edition, Section 11:88 ("[I]t is well settled that a trademark
 19 search report does not constitute evidence of either the existence of a registration or

20 ⁵ As with the previous Requests, in addition to being relevant for all the
 21 reasons already described, Plaintiff's foreign trademark searches are additionally
 22 relevant as Plaintiff put them at issue in its Complaint. Zambrzycki Decl., Ex. A,
 Complaint, ¶¶8-9, 13.

23 ⁶ In correspondence to Ariadne, Plaintiff identified a single case, *Convenient*
 24 *Food Mart, Inc. v. 6-Twelve Convenient Mart, Inc.*, 690 F. Supp. 1457, 1461 n.4
 (D. Md. 1988), purportedly in support of its refusal to provide the requested
 25 discovery. But in that case, the defendant argued that the asserted mark was
 26 generic and the court found that trademark searches were irrelevant to the issue of
 27 genericness, which "rests upon 'the primary significance of the term in the minds of
 the consuming public.'" *Id.* That case simply did not involve an assertion, as here,
 that the asserted mark was in widespread use and therefore merely descriptive and
 entitled to limited protection, thus making trademark searches relevant to
 demonstrate that widespread use.

1 of the use of a mark."); *see also Convenient Food Mart, Inc., v. 6-Twelve
 2 Convenient Mart, Inc.*, et al., 690 F. Supp. 1457, 1461 n.4 (D.Md. 1988) (noting in
 3 relation to motion to compel trademark search that trademark search was not
 4 relevant to strength of mark, since it was not relevant to significance of the mark in
 5 minds of consuming public).

6 EMI's trademark clearance searches are also protected by work product and
 7 attorney client privilege. Given that trademark clearance searches will not show
 8 third party use, there is no justification for invading EMI's attorney-client and work
 9 product privilege and requiring production of these documents. Given that even
 10 current U.S. trademark searches are not relevant, trademark searches from thirty
 11 ago, and foreign trademark searches, have no possible bearing on this case.
 12 Ariadne's statement that it is entitled foreign trademark searches because EMI
 13 referenced (but did not rely on) worldwide use in its Complaint misapprehends the
 14 standard for relevance under Rule 26. A party is not entitled to every document
 15 related to every fact alluded to in a pleading—instead a party is entitled to discover
 16 “any nonprivileged matter that is relevant to any party’s claim or defense.” Fed. R.
 17 Civ. P. 26(b)(1). Ariadne’s claim that trademark searches in foreign jurisdictions
 18 are relevant is particularly puzzling given Ariadne’s previous position, as
 19 repeatedly expressed in its Motion to Dismiss, that its activities outside of the
 20 United States have no relevance to the present action. Dkt. 26. If Ariadne is going
 21 to continue to maintain its position that its own foreign activities have no bearing
 22 on the present dispute, it is unclear how the activities of unknown third parties
 23 could possibly be relevant.⁷

24

25

26

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⁷ Ariadne has separately challenged EMI’s marks in Europe but, of course, Ariadne cannot use discovery in this matter to assist its European case.

28

1 **E. Request for Production Nos. 20, 33, 34**

2 **Request for Production No. 20**

3 All documents related to any facts, allegations, denials or affirmative
 4 defenses in the Complaint, as filed on December 14, 2012, or in Ariadne's Answer
 5 to the Complaint, as filed on March 21, 2013.

6 **Objection to Request for Production 20**

7 EMI incorporates by reference each of its General Objections as though fully
 8 set forth herein. EMI objects to this request on the ground that it seeks information
 9 protected by the attorney-client privilege and the work product doctrine. EMI
 10 objects to this request as vague as to "relating to," and as overbroad and unduly
 11 burdensome to the extent it seeks "all" documents related to broad categories,
 12 which could capture nearly every document in EMI's possession.

13 **Request for Production No. 33**

14 All documents and things that EMI intends to rely upon in this proceeding.

15 **Objection to Request for Production 33**

16 EMI incorporates by reference each of its General Objections as though fully
 17 set forth herein. EMI objects to this request on the ground that it is vague and
 18 ambiguous and seeks to invade the attorney-client and attorney work product
 19 privilege. Subject to and without waiving its objections, EMI will serve its exhibit
 20 list in accordance with the Federal Rules of Civil Procedure and the Local Rules.

21 **Request for Production No. 34**

22 All documents relating to EMI's document retention policies.

23 **Objection to Request for Production 34**

24 EMI incorporates by reference each of its General Objections as though fully
 25 set forth herein. EMI objects to this request on the ground that it seeks information
 26 protected by the attorney-client privilege and the work product doctrine. EMI
 27 objects to this request as vague as to "document retention policies." EMI objects to

1 this request as overbroad in that it seeks “all” documents “relating to” EMI’s
 2 document retention policies. EMI has policies to retain documents in compliance
 3 with applicable state and federal laws pertaining to particular classes of documents.

4 **1. Ariadne’s Position**

5 Plaintiff has objected to producing documents responsive to Request Nos. 20
 6 and 33, which seek documents that pertain to the facts and allegations contained in
 7 the pleadings, and any documents that Plaintiff intends to rely upon in this
 8 proceeding. With respect to Request No. 20, Ariadne offered to limit the Request
 9 to only seek responsive documents “not produced in response to any other of
 10 Ariadne’s Requests for Production of Documents or Interrogatories to [Plaintiff],”
 11 and further to limit the Request to “all documents related to any facts or allegations
 12 set out in [Plaintiff’s] Complaint,” but to no avail. As to Request No. 33, Plaintiff
 13 expressed its concern with the term “*intends* to rely” (despite Ariadne’s assurances
 14 that it is not seeking Plaintiff’s attorneys’ mental impressions or other potentially
 15 privileged material), but has not suggested a compromise. Thus, Plaintiff refuses
 16 to produce documents responsive to these Requests even though Ariadne is plainly
 17 entitled to discovery of all information tending to prove or disprove any of the
 18 claims and defenses at issue in this case that are in Plaintiff’s custody, possession,
 19 or control, which is precisely what these Requests seek. *See Fed. R. Civ. P. 16;*
 20 *26(a)(1), (b)(1); 34(a).*

21 Separately, Plaintiff refuses to produce its document retention policies in
 22 response to Request No. 34, which Ariadne has offered to limit to seek “all
 23 documents setting out any document retention policies, guidelines, or procedures.”
 24 Ariadne has also clarified that it does not seek any materials protected by the
 25 attorney client or any other applicable privilege, but rather documents maintained in
 26 the regular course of Plaintiff’s business. Plaintiff admits that it maintains “policies
 27 to retain documents in compliance with applicable state and federal laws pertaining
 28 to particular classes of documents” and has failed to offer any basis for its refusal to

1 produce them. These policies have become increasingly relevant in view of
 2 Plaintiff's deficient and scattershot production, as described herein.

3 Once again, Plaintiff has offered no authority in support of its refusal to
 4 produce documents responsive to these Requests, despite having the burden to do
 5 so, *Oakes*, 179 F.R.D. at 283, and should be required to produce the full scope of
 6 discovery requested.

7 **2. EMI's Position**

8 **Document Request 20**

9 Defendant's request for "all documents related to any facts, allegations,
 10 denials or affirmative defenses" in the Complaint or Answer is plainly improper, as
 11 it does not specify a recognizable category of documents. If requests such as this
 12 one were permissible, then written discovery would always consist of a single
 13 request—a party could simply demand that opposing counsel turn over every
 14 document related to any fact, allegation, denial or defense, and all possibly relevant
 15 documents (and a large number of non-relevant ones) would be produced. Of
 16 course, this is improper and is contrary to Rule 34.

17 A party propounding discovery is required to specify with reasonable
 18 particularity the categories of documents it is seeking. *Regan-Touhy v. Walgreen*
 19 Co., 526 F.3d 641, 649 (10th Cir. Okla. 2008) (holding that with discovery
 20 "privileges come certain modest obligations, one of which is the duty to state
 21 discovery requests with 'reasonable particularity.'") (citing Fed. R. Civ. P.
 22 34(b)(1)(A)). Reasonable particularity means that "a discovery request should be
 23 sufficiently definite and limited in scope that it can be said 'to apprise a person of
 24 ordinary intelligence what documents are required and [to enable] the court . . . to
 25 ascertain whether the requested documents have been produced.'" *Id.* at 649-50.
 26 Based on this standard, courts routinely reject "kitchen sink" requests such as
 27 Request 20. *See id.* (refusing to compel production in response to request for "all
 28 documents . . . that refer to, mention or relate in any way to Plaintiff, Whitlock, or

1 the litigation or the allegations, facts and circumstances concerning the litigation”).
 2 This Court should similarly refuse to compel that EMI produce documents in
 3 response to Request 20. Indeed, the complaint includes numerous “facts” and
 4 “allegations” regarding basic, background issues (including the parties’ location
 5 and general businesses) and it would be virtually impossible for EMI to produce
 6 every document “related” to each such fact and allegation.

7 Request 33

8 Request 33 for all documents and things that EMI intends to rely upon in this
 9 proceeding also attempts to do an end-run around the reasonable particularity
 10 requirement, and further attempts to invade EMI’s protected work product. EMI has
 11 already stated repeatedly in its meet and confers with Ariadne’s counsel that it will
 12 produce all documents that it will use at trial. But documents on which EMI
 13 “intends to rely” is a nebulous concept, is not a fixed category of documents, and
 14 explicitly seeks to uncover EMI’s trial strategy prior to the applicable disclosure
 15 deadlines.

16 Rather than specifying with reasonable particularity the categories of
 17 documents Ariadne seeks, Ariadne would like a set of documents that EMI
 18 currently believes it will use at trial in November. This would necessarily invade
 19 EMI’s work product privilege, since it is asking EMI’s counsel to sort through the
 20 documents in this case and identify which specific documents it “intends” to use in
 21 the future. Additionally, it is unclear how EMI could even comply with this plainly
 22 improper request, as EMI’s strategy is constantly being refined which, accordingly,
 23 changes the documents that EMI’s counsel “intends to rely” upon at trial.

24 The proper time for disclosure of trial exhibits is governed by the Court’s
 25 Scheduling Order, the Federal Rules of Civil Procedure, and the Local Rules.
 26 Ariadne is not entitled to that trial exhibit list now.

27 Request 34

28 Ariadne’s request for all “document retention policies, procedures and

1 guidelines” seeks a large category of non-responsive documents that have no
 2 bearing on this case. As EMI explained on several occasions to Ariadne’s counsel,
 3 EMI, like all businesses, complies with a variety of local, state and federal laws that
 4 require document retention. Young Decl. ¶ 10. Tax records and personnel records
 5 are just a few of the categories of documents that EMI must retain for specified
 6 periods and/or in a specified manner. Obviously, such policies have no bearing on
 7 the present trademark dispute. Ariadne has provided no authority to support its
 8 request for these policies, nor has it alleged any facts which suggest that document
 9 retention is at issue in this case. Despite EMI’s suggestion, Ariadne refused to
 10 narrow its request to avoid capturing irrelevant information. EMI should not be
 11 compelled to produce non-relevant document retention policies.

12 **F. Request for Production Nos. 1, 3, 5, 13, 15-19, 27, 31-32, 35-39 and**
 13 **Interrogatory Nos. 4 and 5**

14 **Request for Production No. 1**

15 All documents concerning Ariadne, EntrepreneurCountry, or the
 16 EntrepreneurCountry Mark.

17 **Objection to Request for Production 1**

18 EMI incorporates by reference each of its General Objections as though fully
 19 set forth herein. EMI objects to this request on the ground that it seeks information
 20 protected by the attorney-client privilege and the work product doctrine. Subject to
 21 and without waiving its objections, EMI will produce non-privileged documents
 22 responsive to this request.

23 **Request for Production No. 3**

24 All business plans and mission or policy statements for EMI and/or
 25 Entrepreneur Magazine.

26 **Objection to Request for Production 3**

27 EMI incorporates by reference each of its General Objections as though fully
 28 set forth herein. EMI objects to this request as vague as to “business plans and

1 mission or policy statements,” overbroad, unduly burdensome and not reasonably
 2 calculated to lead to the discovery of admissible evidence. Subject to and without
 3 waiving its objections, to the extent they exist, EMI will produce current business
 4 plans and mission statements for EMI.

5 **Request for Production No. 5**

6 The first twelve issues of Entrepreneur Magazine, the most recent 24 issues
 7 of Entrepreneur Magazine, and the first issue of the magazine for each intervening
 8 calendar year.

9 **Objection to Request for Production 5**

10 EMI incorporates by reference each of its General Objections as though fully
 11 set forth herein. EMI objects to this request as not relevant, overbroad and unduly
 12 burdensome, and not reasonably calculated to lead to the discovery of admissible
 13 evidence. Subject to and without waiving its objections, EMI will produce the most
 14 recent issue of Entrepreneur Magazine, and back issues are publicly available for
 15 purchase.

16 **Request for Production No. 13**

17 All documents reflecting or pertaining to any alleged evidence of confusion
 18 on the part of any person between (a) any goods and services offered by EMI, and
 19 (b) any goods or services offered by Ariadne.

20 **Objection to Request for Production 13**

21 EMI incorporates by reference each of its General Objections as though fully
 22 set forth herein. Subject to and without waiving its objections, EMI will produce
 23 the requested non-privileged documents.

24 **Request for Production No. 15**

25 All documents relating to any damages or injury allegedly suffered by EMI
 26 as a result of conduct alleged in the Complaint.

27 **Objection to Request for Production 15**

28 EMI incorporates by reference each of its General Objections as though fully

1 setforth herein. EMI objects to this request on the ground that it seeks information
 2 protected by the attorney-client privilege and the work product doctrine. Subject to
 3 and without waiving its objections, EMI will produce the requested non-privileged
 4 documents.

5 **Request for Production No. 16**

6 All documents identified in EMI's Rule 26(a)(1) disclosures.

7 **Objection to Request for Production 16**

8 EMI incorporates by reference each of its General Objections as though fully
 9 set forth herein. EMI objects to this request as overbroad and unduly burdensome
 10 to the extent it seeks "all" documents, and not reasonably calculated to lead to the
 11 discovery of admissible evidence. Subject to and without waiving its objections,
 12 EMI will produce the requested documents.

13 **Request for Production No. 17**

14 All documents identified, either individually or generally, in EMI's responses
 15 to Ariadne's First Set of Interrogatories.

16 **Objection to Request for Production 17**

17 EMI incorporates by reference each of its General Objections as though fully
 18 set forth herein. EMI objects to this request on the ground that it seeks information
 19 protected by the attorney-client privilege and the work product doctrine. Subject to
 20 and without waiving its objections, EMI will produce documents identified in
 21 EMI's responses to Ariadne's First Set of Interrogatories.

22 **Request for Production No. 18**

23 All documents reviewed or relied upon by EMI in responding to Ariadne's
 24 First Set of Interrogatories or First Set of Requests for Admission.

25 **Objection to Request for Production 18**

26 EMI incorporates by reference each of its General Objections as though fully
 27 set forth herein. EMI objects to this request on the ground that it seeks information
 28 protected by the attorney-client privilege and the work product doctrine. Subject to

1 and without waiving its objections, EMI will produce non-privileged documents
 2 reviewed or relied upon by EMI in responding to Ariadne's First Set of
 3 Interrogatories or First Set of Requests for Admission.

4 **Request for Production No. 19**

5 All documents relating to or supporting any denial of any of the requests in
 6 Ariadne's First Set of Requests for Admission.

7 **Objection to Request for Production 19**

8 EMI incorporates by reference each of its General Objections as though fully
 9 set forth herein. EMI objects to this request on the ground that it seeks information
 10 protected by the attorney-client privilege and the work product doctrine. EMI
 11 objects to this request as vague as to "relating to" and "supporting," and as
 12 overbroad and unduly burdensome to the extent it seeks "all" documents. Subject
 13 to and without waiving its objections, EMI will produce non-privileged documents
 14 supporting denial of any of the requests in Ariadne's First Set of Requests for
 15 Admission.

16 **Request for Production No. 27**

17 Documents sufficient to show, by year and country the promotion,
 18 marketing, advertising, or provision of each and every product or service using the
 19 Entrepreneur Mark or any variation thereof, other than Entrepreneur Magazine.

20 **Objection to Request for Production 27**

21 EMI incorporates by reference each of its General Objections as though fully
 22 set forth herein. EMI objects to this request on the ground that it seeks information
 23 protected by the attorney-client privilege and the work product doctrine. EMI
 24 objects to this request as vague as to "provision" and "any variation thereof," not
 25 relevant, overbroad and unduly burdensome to the extent it seeks documents
 26 sufficient to show "each and every product or service," and seeks documents
 27 outside of the United States, and not reasonably calculated to lead to the discovery
 28 of admissible evidence. Subject to and without waiving its objections, EMI will

1 produce samples of documents showing the promotion, marketing, and advertising
 2 of products or services using the Entrepreneur Mark in the United States.

3 **Request for Production No. 31**

4 All documents that relate or refer to the types of individuals or entities, or the
 5 classes of consumers or entities, who purchase EMI's goods or services offered
 6 under the Entrepreneur Mark.

7 **Objection to Request for Production 31**

8 EMI incorporates by reference each of its General Objections as though fully
 9 set forth herein. EMI objects to this request on the ground that it seeks information
 10 protected by the attorney-client privilege and the work product doctrine. EMI
 11 objects to this request as vague as to "types" and "classes," overbroad and unduly
 12 burdensome, and is not limited to the United States and is not limited in time, and is
 13 not reasonably calculated to lead to the discovery of admissible evidence. Subject
 14 to and without waiving its objections, EMI will produce documents sufficient to
 15 show the types of individuals or entities who currently purchase EMI's goods or
 16 services offered under the Entrepreneur Mark, to the extent such documents exist.

17 **Request for Production No. 32**

18 All documents that relate or refer to the manner in which EMI markets,
 19 promotes, sells, or distributes goods or services under the Entrepreneur Mark.

20 **Objection to Request for Production 32**

21 EMI incorporates by reference each of its General Objections as though fully
 22 set forth herein. EMI objects to this request on the ground that it seeks information
 23 protected by the attorney-client privilege and the work product doctrine. EMI
 24 objects to this request as vague as to "manner", not relevant, overbroad and unduly
 25 burdensome, and not reasonably calculated to lead to the discovery of admissible
 26 evidence. Subject to and without waiving its objections, EMI will produce samples
 27 of documents showing the promotion, marketing, and advertising of products or
 28 services using the Entrepreneur Mark in the United States.

1 **Request for Production No. 35**

2 All documents relating to EMI's contention in paragraph 2 of the Complaint
 3 that "[t]he Defendants, through their Internet presence, conduct business within the
 4 State of California and this District and provide services into the State of California
 5 and this District."

6 **Objection to Request for Production 35**

7 EMI incorporates by reference each of its General Objections as though fully
 8 set forth herein. EMI objects to this request on the ground that it seeks information
 9 protected by the attorney-client privilege and the work product doctrine. EMI
 10 objects to this request as this information is in the possession of Defendant, and
 11 more readily available to the Defendant than to EMI. Subject to and without
 12 waiving its objections, EMI will produce non-privileged responsive documents.

13 **Request for Production No. 36**

14 All documents relating to EMI's contention in paragraph 3 of the Complaint
 15 that "[the defendants] transact business within the State of California and this
 16 District."

17 **Objection to Request for Production 36**

18 EMI incorporates by reference each of its General Objections as though fully
 19 set forth herein. EMI objects to this request on the ground that it seeks information
 20 protected by the attorney-client privilege and the work product doctrine. EMI
 21 objects to this request as this information is in the possession of Defendant, and
 22 more readily available to the Defendant than to EMI. Subject to and without
 23 waiving its objections, EMI will produce non-privileged responsive documents.

24 **Request for Production No. 37**

25 All documents relating to EMI's contention in paragraph 3 of the Complaint
 26 that "[the defendants] have committed the tortious acts specified herein with the
 27 State of California and this District."

1 **Objection to Request for Production 37**

2 EMI incorporates by reference each of its General Objections as though fully
 3 set forth herein. EMI objects to this request on the ground that it seeks information
 4 protected by the attorney-client privilege and the work product doctrine. EMI
 5 objects to this request as vague as to “relating”, overbroad and unduly burdensome
 6 to the extent it seeks “all” documents. EMI objects to this request as this
 7 information is in the possession of Defendant, and more readily available to the
 8 Defendant than to EMI. Subject to and without waiving its objections, EMI will
 9 produce non-privileged responsive documents.

10 **Request for Production No. 38**

11 All documents relating to EMI’s contention in paragraph 3 of the Complaint
 12 that “[the defendants] have committed tortious acts within the State of California
 13 causing injury to persons or property within the State of California and this
 14 District.”

15 **Objection to Request for Production 38**

16 EMI incorporates by reference each of its General Objections as though fully
 17 set forth herein. EMI objects to this request on the ground that it seeks information
 18 protected by the attorney-client privilege and the work product doctrine. EMI
 19 objects to this request as vague as to “relating”, overbroad and unduly burdensome
 20 to the extent it seeks “all” documents. EMI objects to this request as this
 21 information is in the possession of Defendant, and more readily available to the
 22 Defendant than to EMI. Subject to and without waiving its objections, EMI will
 23 produce non-privileged responsive documents.

24 **Request for Production No. 39**

25 All documents relating to EMI’s contention in paragraph 3 of the Complaint
 26 that “[the defendants] have purposefully availed themselves of the privilege of
 27 doing business within the State of California.”

1 **Objection to Request for Production 39**

2 EMI incorporates by reference each of its General Objections as though fully
 3 set forth herein. EMI objects to this request on the ground that it seeks information
 4 protected by the attorney-client privilege and the work product doctrine. EMI
 5 objects to this request as vague as to “relating”, overbroad and unduly burdensome
 6 to the extent it seeks “all” documents. EMI objects to this request as this
 7 information is in the possession of Defendant, and more readily available to the
 8 Defendant than to EMI. Subject to and without waiving its objections, EMI will
 9 produce non-privileged responsive documents.

10 **Interrogatory No. 4**

11 Identify separately as to each Entrepreneur Good and Service identified in
 12 response to Interrogatory No. 2, any and all past, present and future planned
 13 advertising, marketing and/or other promotional activities, including the costs
 14 associated with each activity, carried on by Plaintiff in connection with
 15 Entrepreneur Goods and Services or the Entrepreneur Mark.

16 **CONFIDENTIAL Response to Interrogatory No. 4**

17 EMI incorporates by reference each of its General Objections as though fully
 18 set forth herein. EMI objects to this interrogatory on the ground that it seeks
 19 information protected by the attorney-client privilege and the work product
 20 doctrine. EMI objects to this request as vague, not relevant, overbroad and unduly
 21 burdensome to the extent it seeks “all” past, present and future planned advertising,
 22 and not reasonably calculated to lead to the discovery of admissible evidence. EMI
 23 objects to this interrogatory as compound and counts as 15 separate interrogatories.
 24 Subject to and without waiving its objections, EMI responds that pursuant to
 25 Federal Rule of Civil Procedure 33(d) it will produce documents sufficient to show
 26 representative samples of EMI’s advertising and promotional activities. EMI
 27 further responds that its annual advertising expenditures from 2011 through 2013
 28 were as follows:

1

2

3

4

Interrogatory No. 5

5 Identify any and all communications with persons or entities not a party to
6 this lawsuit concerning Ariadne, EntrepreneurCountry, or the EntrepreneurCountry
7 Mark, including communications concerning the www.entrepreneurcountry.com
8 web site.

9

Response to Interrogatory No. 5

10 EMI incorporates by reference each of its General Objections as though fully
11 set forth herein. EMI objects to this interrogatory on the ground that it seeks
12 information protected by the attorney-client privilege and the work product
13 doctrine. EMI objects to this request as not relevant, overbroad and unduly
14 burdensome, and not reasonably calculated to lead to the discovery of admissible
15 evidence. Subject to and without waiving its objections, EMI responds that to the
16 extent such communications exist, and they are in the possession, custody and
17 control of EMI, EMI will produce responsive non-privileged communications
18 pursuant to document requests and Rule 33(d).

19

1. Ariadne's Position

20 In addition to its refusal to produce documents in response to Ariadne's
21 discovery requests as set forth in Sections III.A.- E., *supra*, Plaintiff has also failed
22 to produce the documents that it agreed to produce in response to Ariadne's
23 Request Nos. 1, 3, 5, 13,15-19, 27, 31-32, 35-39, and in connection with
24 Interrogatory Nos. 4 and 5. Plaintiff has suggested that it has produced all the
25 requested documents and that before it can produce any additional documents, it is
26 Ariadne's burden to identify "specific documents" that EMI has failed to produce.
27 But there is of course no way for Ariadne to know what specific responsive
28 documents are in Plaintiff's possession, custody and control. What is clear,

1 however, is that Plaintiff's production is deficient on its face.

2 As an initial matter, to date, Plaintiff has produced **a total of approximately**
 3 **250 documents** in response to Ariadne's discovery requests. Zambrzycki Decl.,
 4 ¶11. Moreover, **more than half of this already limited production consists**
 5 **entirely of:**

- 6 • communications with the United States Patent and Trademark Office
 7 ("PTO") regarding Plaintiff's trademark registrations (approximately
 8 65 documents—i.e., 25% of the entire production);
- 9 • circulation numbers for Plaintiff's "Entrepreneur" magazine
 10 (approximately 35 documents);
- 11 • covers of Plaintiff's "Entrepreneur" magazine (approximately 24
 12 documents); and
- 13 • web printouts from 2012 and 2014, rather than documents kept in the
 14 normal course of Plaintiff's business (approximately 16 documents).
 15 Zambrzycki Decl., ¶12.

16 Plaintiff can hardly claim that the remaining 100+ documents that it has
 17 produced can possibly cover several years' worth of documents responsive to these
 18 Requests and Interrogatories, which encompass documents concerning Plaintiff's
 19 advertising, marketing, and promotional activities under the Entrepreneur mark, and
 20 the costs associated therewith; Plaintiff's provisions of goods and services under
 21 the Entrepreneur mark; Plaintiff's documents, including communications, regarding
 22 Ariadne, EntrepreneurCountry, the EntrepreneurCountry Mark, and
 23 EntrepreneurCountry website; Plaintiff's business plans; Plaintiff's
 24 communications regarding the Entrepreneur mark or related goods and services;
 25 copies of Plaintiff's Entrepreneur magazine; Plaintiff's evidence reflecting or
 26 pertaining to any alleged evidence of confusion regarding EMI's and Ariadne's
 27 goods and/or services; Plaintiff's evidence pertaining to any alleged damages or
 28 injury; documents concerning Plaintiff's trademark licensing; documents

1 concerning Plaintiff's trademark enforcement; Plaintiff's invoices;⁸ Plaintiff's
 2 documents relied on in answering Ariadne's discovery requests; Plaintiff's
 3 documents regarding consumers of its goods and services under the Entrepreneur
 4 mark; Plaintiff's documents regarding its marketing and promotional channels; and
 5 Plaintiff's documents supporting its allegations that Ariadne conducts business or
 6 has committed tortious acts within California.

7 Notably, other than four heavily redacted e-mails dated in April 2014,
 8 Plaintiff's production is **entirely devoid of any communications**. Zambrzycki
 9 Decl., ¶13. Its production **also completely lacks** any business plans, invoices,
 10 trademark licensing information, trademark enforcement information, evidence of
 11 confusion, or evidence of damages. *Id.*, ¶14. Moreover, because the number of
 12 these 100+ remaining documents produced by Plaintiff—which include, *inter alia*,
 13 a few articles from its website, a few articles regarding the Entrepreneur magazine,
 14 and a few samples of Plaintiffs' advertisements—is so low, these documents must
 15 have been either produced at random or, worse, cherry-picked for production.
 16 Indeed, Plaintiff has produced no more than a handful of documents from each of
 17 the years 2000-2006 and 2011, with the majority of its production appearing to
 18 come from 2007-2010, and mostly from 2010. *Id.*, ¶15.

19 Accordingly, Plaintiff should be compelled to supplement its production by
 20 producing all documents in its custody, possession, or control responsive to the
 21 above Requests and in connection with the above Interrogatories.

22 2. EMI's Position

23 Without any evidentiary support, Ariadne asserts that EMI is withholding
 24 documents. Yet Ariadne cannot identify any specific documents that EMI should
 25

26 ⁸ Plaintiff itself identified “[d]ocuments relating to … trademark licensing
 27 and trademark enforcement” as well as “invoices” as relevant to this case in its
 28 Initial Disclosures, despite its failure—and refusal—to produce any of this
 information. Zambrzycki Decl., Ex. B at 2.

1 have, and yet has not, produced. Instead, Ariadne grossly mischaracterizes EMI's
 2 production and ignores that fact that the requested documents in many cases either
 3 do not exist, or are not under the control of EMI. And, failing to acknowledge that
 4 its own production consisted of only approximately 125 documents, Ariadne cries
 5 that EMI's production must be lacking because EMI has produced "approximately
 6 250 documents."

7 EMI's production was not "cherry-picked" and Ariadne cites no evidence to
 8 support that allegation. It is unclear what would be the proper number of
 9 documents for a Plaintiff to produce in a straight-forward trademark infringement
 10 case, and Ariadne provides no explanation as to which aspect of EMI's production
 11 would be expected to consist of large numbers of documents. EMI produced over
 12 1600 pages of documents. Much of the relevant evidence in this case is in the
 13 hands of Ariadne, not EMI. Yet Ariadne's production of approximately 125
 14 documents was only 1312 pages and largely consisted of programs or brochures for
 15 its events.

16 For many of Ariadne's requests, no or very few responsive documents exist.
 17 For example, EMI has no reason to have documents on Ariadne, and thus excepting
 18 cease and desist correspondence with Ariadne, and screenshots obtained in support
 19 of that correspondence and the Complaint (which were produced), EMI does not
 20 possess any records. Documents relating to damages are under the control of
 21 Ariadne, not EMI, and thus EMI has no documents to produce prior to the expert
 22 disclosure deadline. As in the vast majority of trademark cases, instances of actual
 23 confusion are very difficult to prove, and generally are not contained in documents,
 24 and thus there are few if any documents for EMI to produce in response to that
 25 request. *Au-Tomotive Gold, Inc. v. Volkswagen of America, Inc.*, 457 F.3d 1062,
 26 1075 (9th Cir. 2006) ("[A]ctual confusion is hard to prove; difficulties in gathering
 27 evidence of actual confusion make its absence generally unnoteworthy.").
 28

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED] EMI has provided representative samples of
 4 magazine covers, an issue of the magazine, screenshots from the website, and other
 5 documents listing and showing other types of goods and services EMI provides.
 6 Wheatley Decl. ¶ 10. It is unclear what additional documents EMI could provide
 7 that are not merely cumulative.

8 EMI has also produced documents showing the characteristics of its
 9 customers, such as demographic and other data, obtained through market research.
 10 Wheatley Decl. ¶ 9. This is also not a category of documents which is voluminous –
 11 EMI does not conduct the same market studies over and over, and EMI provided
 12 such documents for a reasonable time period, *i.e.* the period of infringement at issue
 13 here. EMI’s evidence of Ariadne’s activities in California derives from the
 14 documents attached to the Complaint (which were produced) and Ariadne’s own
 15 documents and testimony. *Id.* ¶ 13. Similarly, EMI has in fact produced all
 16 documents identified in its Rule 26 disclosures, and all documents identified or
 17 relied upon in responding to Interrogatories or Requests for Admission—again
 18 neither request implicated a significant number of documents.

19 Ariadne has not provided any justification for its claim that EMI’s production
 20 is deficient beyond speculating that EMI “should” have produced more documents
 21 (a theory that does not make sense given the substance of Ariadne’s requests).
 22 Ariadne has also failed identify any specific gaps in EMI’s production. Ariadne’s
 23 claim that no communications were produced is factually inaccurate, and not
 24 relevant as Ariadne has not pointed to any evidence or specific requests that show
 25 that EMI is withholding relevant communications. Wheatley Decl. ¶ 12 (identifying
 26 communications). Despite the lack of support for Ariadne’s claims, EMI has
 27 nonetheless gone through the cited requests and reconfirmed that relevant, non-
 28 privileged documents were produced, as discussed below.

Request for Production 1

EMI reviewed its records for documents responsive to this request, and has produced all non-privileged documents relating to Ariadne, EntrepreneurCountry, or the EntrepreneurCountry Mark which were located after a reasonable search. Young Decl. ¶ 3.

Request for Production 3

EMI reviewed its records and produced any current business plans or mission or policy statements for EMI to the extent they exist. *Id.* ¶ 4.

Request for Production 5

EMI has produced a representative issue of *Entrepreneur* magazine in its entirety. Ariadne's request for an additional 50 plus separate issues is overbroad and unduly burdensome. Further, Ariadne has provided no explanation as to why it needs 50+ separate issues of *Entrepreneur* magazine dating back thirty years. To the extent Ariadne wants additional copies of *Entrepreneur* magazine, back issues are available for purchase on EMI's website. The cost to Ariadne of purchasing the back issues it wants will be less than or equal to the cost to EMI of attempting to locate and produce those issues. *Id.* ¶ 5.

Request for Production 13

EMI reviewed its records and has produced any documents showing actual confusion which it located after a reasonable search. *Id.* ¶ 6.

Request for Production 15

Documents relevant to damages suffered by EMI, such as documents relating to Ariadne's profits, are under the control of Ariadne, and not EMI. To the extent EMI relies on an expert to determine damages, EMI will disclose any non-privileged expert reports in accordance with the Federal and Local Rules. *Id.* ¶ 7.

Request for Production 16

EMI has produced any documents identified in its Rule 26 disclosures. *Id.* ¶ 8.

1 Requests 17-19

2 EMI has produced any documents identified in or relied upon in response to
3 Ariadne's Interrogatories or Requests for Admission. *Id.* ¶ 8.

4 Request for Production 27
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]

8 Request for Production 31

9 EMI has produced documents sufficient to show the types of individuals or
10 entities who currently purchase EMI's goods and services. Wheatley Decl. ¶ 9.

11 Request for Production 32

12 EMI has produced samples of documents showing the promotion, marketing
13 and advertising of EMI's products and services bearing the Entrepreneur® mark in
14 the United States. *Id.* ¶ 9; Young Decl. ¶ 9.

15 Requests for Productions 35-39

16 EMI has produced documents which show that the Defendants transact
17 business and committed tortious acts causing injury within the state of California.
18 Wheatley Decl. ¶ 13. Indeed, Ariadne filed a motion to dismiss claiming that it
19 does not do business in the United States, to which EMI responded with evidence.
20 Ariadne's motion was denied. Dkt. 44.

21 Interrogatory 4

22 EMI produced documents detailing its advertising and marketing
23 expenditures by specific good or services. EMI also produced samples of its
24 promotional activities. EMI has agreed to identify responsive documents pursuant
25 to Fed. R. Civ. P. 33(d). Young Decl. ¶ 9; Wheatley Decl. ¶¶ 10-11.

26 Interrogatory 5

27 EMI has not identified any non-privileged communications which are
28 responsive to Interrogatory 5, and to its knowledge, no such non-privileged

1 communications exist. Young Decl. ¶ 11.

2 **IV. Ariadne's Conclusion**

3 Plaintiff's approximately 250 document production is deficient on its face
 4 and its objections to the Requests and Interrogatories identified above are baseless.
 5 Accordingly, Plaintiff should be ordered to supplement its production and produce
 6 all of the documents requested in Ariadne's Request Nos. 1, 3, 5, 7, 8, 10-39 and in
 7 connection with Interrogatory Nos. 4, 5, and 23.

8 **V. EMI's Conclusion**

9 EMI's document production is complete and is reasonable, given the
 10 documents requested and the claims at issue in this case. The majority of Ariadne's
 11 requests seek non-relevant documents, or seek to require EMI's attorneys to reveal
 12 their mental impressions so that Ariadne can free-ride off of that analysis. Ariadne
 13 has not cited any authority in support of its requests, and in fact the plain language
 14 of Rule 26 and available case law indicate that many of Ariadne's requests are
 15 improper. Furthermore, many of the documents sought by Ariadne are publicly
 16 available, and equally accessible to the Defendants.

17 Given that Ariadne did not comply with Rule 37 and has (1) failed to link its
 18 requests to claims and defenses in this case, (2) failed to show good cause for a
 19 broader "subject matter" inquiry, and (3) failed to show any evidence that EMI has
 20 not produced documents it agreed to produce, Ariadne's motion should be denied in
 21 its entirety.

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